

FEDERAL CIRCUIT COURT OF AUSTRALIA

*HAND v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 260

Catchwords:

MIGRATION – Administrative review– Visa – permanent entry visa (spouse) –
no jurisdictional error demonstrated – application dismissed

Legislation:

Migration Act 1958 (Cth)

Applicant:	DANIEL THOMAS HAND
First Respondent:	MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	BRG 630 of 2015
Judgment of:	Judge Vasta
Hearing date:	18 January 2016
Date of Last Submission:	18 January 2016
Delivered at:	Brisbane
Delivered on:	18 January 2016

REPRESENTATION

Counsel for the Applicant: Mr P.A. Travers

Solicitors for the Applicant: Chand Lawyers

Counsel for the First Respondent: Mr B. McGlade

Solicitors for the First
Respondent: Clayton Utz

ORDERS

- (1) That the Applicant be granted leave to file and serve an Amended Application.
- (2) That the name of the Second Respondent be amended to “Administrative Appeals Tribunal”.
- (3) That the Application be dismissed.
- (4) That the Applicant pay the First Respondent’s costs fixed in the sum of \$6,825.00

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 630 of 2015

DANIEL THOMAS HAND

Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

And

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Ex tempore)

1. By application filed in this Court on 6 July 2015, and by amended application filed on 15 December 2015, the Applicant, Daniel Thomas Hand, seeks judicial review of a decision of the now Administrative Appeals Tribunal which affirmed a decision of the delegate of the Minister not to issue, in effect, a spousal visa to the wife of the Applicant. As noted at the beginning of this hearing, it is somewhat unusual that the Applicant is an Australian citizen, whereas the visa Applicant is his wife, Ubashni Hand.

2. Mrs Hand submitted to any order the Court may make in this matter with regard to it. So the matter has proceeded on the basis that the Applicant is making the application for the visa. The ground upon which the matter has been argued here, is that the Tribunal committed jurisdictional error in that it failed to consider, on balance, all the relevant material in assessing whether the Applicant and his wife had a genuine and continuing relationship in light of the wife being prevented from travelling to Australia and the limited financial means of the Applicant.
3. That ground was argued by Mr Travers, who conceded that it was not a ground suggesting that the findings were not open to the Tribunal. Instead, it was a ground that suggested that what the Tribunal did not do, as it should have done, is to consider the evidence as a whole.
4. Mr Travers agreed with my summation that, in the same way that a tribunal of fact has to consider circumstantial evidence, the Tribunal has to consider the evidence before it, and whilst one strand may not be sufficient to lift a weight, many strands twined together to form a rope may give sufficient strength to enable to lift the weight. In this case, the weight was showing that the Applicant and the visa Applicant were in a genuine and continuing relationship.
5. Those aspects that the Tribunal did consider are contained in fairly precise reasons given by the Tribunal. The Tribunal did, in looking at the matter, go through the history of the matter and then consider the claims and evidence.
6. In short compass, the Applicant here is a 66 year old man who in 2010 went to a restaurant in Brisbane and spoke to a woman, asking if she knew any nice, tall Indian girls who wanted to marry. That woman gave the Applicant a telephone number and a photograph of the visa Applicant.
7. This Applicant then began calling the visa Applicant frequently, and they corresponded and spoke for some time. It seems that went on for almost two years. On 25 March 2012, the Applicant and the visa Applicant decided that they would marry.

8. They arranged the wedding after the Applicant arrived in Fiji. It seems that that the Applicant arrived in September 2012. This was the first time the two had met face to face. There they had a legal marriage ceremony and a Christian marriage ceremony, and they stayed at the parents' home. They had a honeymoon at a hotel. The wedding occurred in October 2012.
9. Soon afterwards, the Applicant returned back to Australia. From that time, there has been a constant contact electronically and constant correspondence; however, the parties have not really spent any time together. The visa Applicant cannot come to Australia and the Applicant lives here. It seems sometime after May 2015 that the Applicant was able to go to Fiji and spent some time with the visa Applicant.
10. The Tribunal was not satisfied that this was a genuine and continuing relationship. The Tribunal considered the evidence. The Tribunal looked at a number of specific areas of the evidence. They looked at the financial aspects of the evidence. That is contained from paragraphs 57 to 60. The Tribunal looked at the nature of the household from paragraphs 61 to 64, and the Tribunal looked at social aspects of the relationship from paragraphs 65 to 69 and then looked at the nature of the persons' commitment to each other from paragraphs 70 through, realistically, to 79.
11. The claim made here is that, whilst those aspects were considered, they were not considered as a whole, and whilst one can look at these particular matters and compartmentalise them, the submission is made that one needs to consider them as a whole to come to a proper conclusion.
12. The question I then have to ask myself is "*did the Tribunal consider the matters as a whole?*". The submission was made by the Applicant that the Tribunal did not fully appreciate all of the circumstances of the situation and that the Applicant and the visa Applicant could only spend very limited time together for reasons that were beyond their control and their financial resources.
13. It was submitted that, when one had a look at all of the circumstances, it simply was not feasible for the Applicant to stay with his wife over

protracted periods, because of his limited financial capabilities. The argument really is that the sort of relationship that the Tribunal (or the delegate of the Minister) were looking for, could not have been able to be demonstrated, simply because the Minister, in not allowing the visa, created the circumstances which meant that the visa Applicant could not spend time with the Applicant.

14. It was submitted that in this case it meant that the Applicant and the visa Applicant just had insufficient time to show that they were in a committed and genuine, continuing relationship; in effect, a “catch 22” situation. It is that aspect that was not fully appreciated by the Tribunal, it is submitted. It is submitted that if the Tribunal had had a look at all of the matters, rather than focusing simply on each matter individually, that is what could have, not necessarily would have, but could have been the conclusion; therefore, not focusing on those matters, the submission goes, leads to jurisdictional error.
15. The decision of the Tribunal, which sets out what the Tribunal did take into consideration, is instructive. The Tribunal has looked at a number of matters, helpfully enumerated by Mr McGlade. He points out that the Tribunal had looked at these aspects;
 - a) That the parties had not pooled their assets together;
 - b) That the parties had no joint property;
 - c) That the parties had not disclosed the fact of the marriage to family members on the Applicant’s side;
 - d) That the Applicant, who had been married and divorced four times previously, seemed to have no problems in deciding to marry someone for whom he had not even had a face-to-face meeting, notwithstanding that at least one of those previous marriages he has described to the Tribunal as being a migration scam; and
 - e) That the parties have spent some seven weeks together since marrying.
16. Like Mr McGlade, I take some significance with paragraph 73 of the Tribunal’s decision. That reads:

“At the hearing, the review applicant gave oral evidence detailing his trips to Fiji to meet and spend time with the visa applicant. The Tribunal has placed weight on the fact that the parties have only spent around seven weeks in each other’s company since they decided to marry in March 2012. The Tribunal considers it particularly significant that the review Applicant did not travel to Fiji for almost two and a half years between October 2012 and March 2015 to spend time with the visa applicant. The Tribunal notes the review applicant’s evidence that he has limited means and his only income is a pension; however the parties gave consistent evidence that he has sent money to the visa applicant on a regular basis since the inception of the relationship. He was unable to estimate the total amount sent but said that he is generous with his money, within his means. The review applicant said that he gave FJD\$1,000 to the visa applicant when he travelled to Fiji earlier this year. Fiji is a close neighbour of Australia and flights are relatively inexpensive, particularly outside of peak travelling periods. He is able to stay with the visa applicant’s extended family, so has no accommodation expenses while in Fiji. The Tribunal accepts that the review applicant’s only income is a pension, but the evidence indicates that he is prioritising the provision of financial support to the visa applicant over spending time with her. The review applicant stated, in his written submissions prior to the hearing, that Centrelink advised him that it would review the rate of his pension if he travelled to Fiji to spend time with his wife. He asserted that if he visited the visa applicant in Fiji, he would lose part of his pension, which is not what the letter he provided to the Tribunal from Centrelink said. It merely said that the rate of his single rate of pension would be reviewed if the review Applicant travelled to Fiji or the visa applicant arrives in Australia. The review applicant has not provided any independent evidence to support his claim that he was advised that he would be placed on the partnered rate of pension if he visited the visa applicant in Fiji. The Tribunal did not find his reasons for not travelling to Fiji to spend time with the visa applicant to be convincing. The Tribunal acknowledges that the visa applicant is unable to travel to Australia.”

17. That aspect, whilst it is not the only aspect, is obviously a great part of this matter but it has to be seen in context with everything else. At paragraph 75, the Tribunal said this:

“The Tribunal considers that the review applicant’s financial support of the visa applicant demonstrates a level of commitment to the relationship on his part. The Tribunal also accepts that the

review applicant has disclosed his criminal conviction and subsequent period of incarceration to the visa applicant. The visa applicant is also aware of the review applicant's previous marriages and had some knowledge of his children, although she has only spoken with one son. Her decision to convert to Christianity indicates a level of commitment to the relationship on her part.

18. At 76, the Tribunal said:

“The Tribunal has taken into account that the review applicant concealed his relationship with the visa applicant from members of his family, including his adult children, until after the parties’ marriage. He has since disclosed the relationship to three of his children and his brother is also apparently aware of the parties’ marriage. No supporting statements have been provided by any of the review applicant’s family members. The review applicant told the Tribunal he did not disclose the relationship to his children before the marriage because he was concerned that his first wife would interfere with the relationship. The Tribunal did not find that explanation persuasive in the context of the visa applicant residing in Fiji.

19. The Tribunal then said:

“The Tribunal has taken into account the supporting statements and statutory declarations by witnesses. Those statutory declarations assert that the parties’ relationship is genuine and continuing. The Tribunal has placed some weight on that evidence given many of the declarants attended the parties’ wedding celebrations and have spent time with them in Fiji. The Tribunal has also taken into account the oral evidence provided by Mr Walker and Pastor Yankaiya at the hearing...”

20. The Tribunal then said:

“The Tribunal has placed some weight on that evidence, but it does not overcome the other concerns the Tribunal has about the parties’ relationship outlined in this decision.

79. The Tribunal considers that there is insufficient evidence that the parties provide one another with companionship or emotional support. After considering all of the evidence before it, the Tribunal is not persuaded that the review and visa applicants have a long-term commitment to the relationship.”

21. It seems to me that, when one goes through the reasons, notwithstanding the criticism that has been made of the manner in which the Tribunal has approached its task, what the Tribunal has done has been to correlate and to synthesise all of the evidence before it. The Tribunal, in doing that, has laid out what it considers to be the important aspects of the evidence before it. It concludes with:

“...After considering all of the evidence before it, the Tribunal is not persuaded that the review and visa applicants have a long-term commitment to the relationship.”

22. It seems to me, when one has a look at that, the ground that is pursued at this hearing cannot be made out. It seems to me that the Tribunal has, in fact, done what it ought to have done and that is to look at all the aspects of the evidence, put it all together, and to decide whether the strands that make up the proverbial rope have been enough to carry the weight or have not.
23. The Tribunal have come to the conclusion that it cannot. Whilst the Applicant may disagree with that, there is a concession that that conclusion was a conclusion that was open on the evidence.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Judge Vasta

Date: 11 February 2016